Canon U.S.A. Inc. v. Thuy Le, et al.
SACV 15-938 JVS (Ex)

TENTATIVE Order Regarding Motion to Intervene, Motions to Set Aside Default, and Order to Show Cause Why Court Should Not Order Sale of Real Property

There are four motions at issue.

First, Nationstar Mortgage LLC ("Nationstar") moved to intervene in the action. (Mot., Docket No. 56.) Plaintiff and Judgment Creditor Canon U.S.A., Inc. ("Canon") opposed. (Opp'n, Docket No. 62.) Nationstar replied. (Reply, Docket No. 71.)

For the reasons discussed below, the Court **denies** Nationstar's motion to intervene.

Second Nationstar moved to set aside default. (Mot., Docket No. 55.) Canon opposed. (Opp'n, Docket No. 61.) Nationstar replied. (Reply, Docket No. 70.)

For the reasons discussed below, the Court **denies** Nationstar's motion.

Third, Defendant Thuy Le a/k/a Thuy Trong a/k/a Tony Le ("Le") moved to set aside default. (Mot., Docket No. 50.) Canon opposed. (Opp'n, Docket No. 59.) Canon also filed evidentiary objections. (Obj., Docket No. 60.) Le replied. (Reply, Docket No. 72.)

For the reasons discussed below, the Court **denies** Le's motion.

Fourth, Canon moved for an order to sell the Property at issue. (Appl., Docket No. 30.) This Court issued an order to show cause why order for sale of real property should not be made. (Order, Docket No. 31.) Nationstar opposed. (Opp'n, Docket No. 54.) Le opposed. (Opp'n, Docket No. 58.) Canon replied to both oppositions. (Reply, Docket No. 63; Reply, Docket No. 67.) Canon also filed a request for judicial notice. (Req., Docket No. 64.)

For the reasons discussed below, the Court **does not** order sale of the real property.

I. BACKGROUND

A. Judicial Notice

A court may take judicial notice of facts that are readily determinable from accurate sources. Fed. R. Evid. 201(b)(2). Judicial notice is appropriate for county land records. Rosal v. First Fed. Bank of Cal., 671 F. Supp. 2d 1111, 1121 (N.D. Cal. 2009).

Canon requests that the Court takes judicial notice of five exhibits, which are labeled as exhibits 1–5.[1] (Req. Jud. Ntc., Docket No. 64.) These five exhibits are county land records, so the Court grants Canon's request for judicial notice. (Id.)

B. Factual and Procedural Background

On June 12, 2015, Canon filed a complaint against Le, Thanh P. Nguyen a/k/a Thanh Phuong Nguyen a/k/a Thanh Nguyen ("Nguyen"), and Michelle T. Tran a/k/a Michelle Duong ("Duong") (collectively, "Defendants") for trademark infringement, unfair competition, trade dress infringement, dilution, and constructive trust. (Compl., Docket No. 1.) On November 4, 2015, the clerk entered a default against Defendants. (Docket No. 16.) On February 22, 2016, the Court granted Canon's motion for a default judgment against Defendants. (Min., Docket No. 21.) The Court ordered Defendants to pay damages to Canon pursuant

[1] (1) "Abstract of Judgment/Order" issued March 17, 2016, recorded March 17, 2016 in the Official Records of the Orange County Clerk-Recorder's Office as Document No. 2016000111898 (Exhibit 1); (2) "Trustee's Deed Upon Sale," recorded February 3, 2015, in the Official Records of the Orange County Clerk-Recorder's Office as Instrument No. 2015000051441 (Exhibit 3); (3) "Grant Deed," recorded March 30, 2016, in the Official Records of the Orange County Clerk-Recorder's Office as Instrument No. 2016000133271 (Exhibit 4); (4) "Grant Deed," recorded June 30, 2016, in the Official Records of the Orange County Clerk-Recorder's Office as Instrument No. 2016000299653 (Exhibit 5); (5) "Deed of Trust," recorded June 30, 2016, in the Official Records of the Orange County Clerk-Recorder's Office as Instrument No. 2016000299654 (Exhibit 6).

to 15 U.S.C. § 1117 in the sum of $240,000.00. (J., Docket No. 22 ¶ 6.)

On March 16, 2016, Canon recorded an abstract of judgment in the official records of Orange County. (Ex. B, Docket No. 30-1.) At that time, Le owned real property commonly known as 16707 Daisy Avenue, Fountain Valley, California 92708 ("the Property"). (Ex. C, Docket No. 30-1.) On March 28, 2016, Le conveyed the Property to My Thi Nguyen ("M. Nguyen"), who is Le's wife. (Wang Decl., Docket No. 30-1 ¶ 5; Ex. E, Docket No. 30-1.) On June 15, 2016, M. Nguyen conveyed the Property to four individuals: Thanh Ngoc Le ("T. Le"), Huong Le ("H. Le"), Hung N. Ngo ("H. Ngo"), and Paula P. Ngo ("P. Ngo") (collectively, "Current Owners"). (Ex. F, Docket No. 30-1.)

The Current Owners financed their purchase of the Property with a loan from NMSI, Inc. ("NMSI"), which was secured by the deed of trust recorded against the Property. (Ex. A, Docket No. 54-1.) Mortgage Electronic Registration Systems, Inc. ("Mortgage Electronic"), as nominee for NMSI, assigned the deed of trust to Nationstar. (Ex. B, Docket No. 56-3.)

II. LEGAL STANDARD

A. Federal Rule of Civil Procedure 24

Under Rule 24, there are two types of intervention: (1) intervention of right and (2) permissive intervention.

1. Intervention of Right

Federal Rule of Civil Procedure 24(a)(2) requires a court, upon timely motion, to permit intervention of right by anyone who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." When analyzing a motion to intervene of right under Rule 24(a)(2), the Ninth Circuit applies a four-part test:

> (1) the motion must be timely; (2) the applicant must claim a "significantly protectable" interest relating to the property or

> transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action.

Wilderness Soc. v. U.S. Forest Serv., 630 F.3d 1173, 1177 (9th Cir. 2011) (en banc) (quoting Sierra Club v. EPA, 995 F.2d 1478, 1481 (9th Cir. 1993)).

2. Permissive Intervention

Under Rule 24(b)(1)(B), a court may permit intervention if the prospective intervener "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). In the Ninth Circuit, a court has discretion to permit intervention when a movant presents: "(1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant's claim or defense and the main action." Freedom from Religion Found., Inc. v. Geithner, 644 F.3d 836, 843 (9th Cir. 2011) (internal quotations and citations omitted).

B. Federal Rule of Civil Procedure 60

1. Service

Pursuant to Federal Rule of Civil Procedure 60(b)(4), a court may set aside a default judgment if the judgment is void. "A final judgment is void, and therefore must be set aside under Rule 60(b)(4), only if the court that considered it lacked jurisdiction . . . over the parties to be bound." SEC v. Internet Sols. for Bus. Inc., 509 F.3d 1161, 1165 (9th Cir. 2007) (internal quotations and citations omitted). "A federal court does not have jurisdiction over a defendant unless the defendant has been served properly under Fed. R. Civ. P. 4." Direct Mail Specialists, Inc. v. Eclat Computerized Techs., Inc., 840 F.2d 685, 688 (9th Cir. 1988).

2. Mistake or Excusable Neglect

A court may, on motion, relieve a party from a final judgment on grounds of "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. Pro. 60(b)(1). Rule 60(b) is "remedial in nature and . . . must be liberally applied" to overturn default judgments. TCI Group Life Ins. Plan v. Knoebber, 244 F.3d 691, 696 (9th Cir. 2001). There is a strong preference for a decision on the merits; allowing a default judgment to stand is disfavored and "appropriate only in extreme circumstances." Id. When a defendant seeks timely relief from the default judgment, doubts should be resolved in favor of granting the motion to set aside the judgment. In re Hammer, 940 F.2d 524, 525 (9th Cir. 1991).

C. Federal Rule of Civil Procedure 69

Under Federal Rule of Civil Procedure 69(a)(1), "[t]he procedure on execution—and in proceedings supplementary to and in aid of judgment or execution—must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies." Section 695.010(a) of the California Civil Procedure Code recites that "all property of the judgment debtor is subject to enforcement of a money judgment."

III. DISCUSSION

A. Nationstar's Motion to Intervene

The Court finds that Nationstar does not meet the requirements of intervention of right or permissive intervention, so it **denies** Nationstar's motion to intervene.

1. Intervention of Right

The Court finds that Nationstar does not have a significantly protectable interest, so Nationstar does not have a right to intervene.

a. Timeliness

A finding of untimeliness defeats a motion for intervention of right or permissive intervention. League of United Latin Am. Citizens v. Wilson, 131 F.3d 1297, 1308 (9th Cir. 1997) (quoting United States v. Washington, 86 F.3d 1499, 1507 (9th Cir. 1996)). To determine whether a Rule 24(a) motion for intervention of right is timely, courts must consider three factors: (1) the stage of the proceedings; (2) the prejudice to existing parties; and (3) the length and reason for the delay. United States v. Alisal Water Corp., 370 F.3d 915, 921 (9th Cir. 2004).

Based on these three factors, the Court finds that Nationstar's motion to intervene is timely.

i. Stage of the Proceedings

To determine whether intervention is timely under this factor, a court must consider whether "a party's interest in a specific phase of a proceeding may support intervention at that particular stage of the lawsuit." Id. at 921. Here, Nationstar's interest is in the Property, and the Court issued the order to show cause why order for sale of the Property should not be made on January 30, 2017. (Order, Docket No. 31.) Accordingly, this factor favors timeliness.

ii. Length and Reason for Delay

To be timely, the prospective intervenor must seek to intervene when he "knows or has reason to know that his interests might be adversely affected by the outcome of the litigation." United States v. Oregon, 913 F.2d 576, 589 (9th Cir. 1990). If the prospective intervenor does not seek to intervene at that time, the prospective intervenor must provide the court with reasons for the delay. League of United Latin Am. Citizens, 131 F.3d at 1304.

Here, the Current Owners financed their purchase of the Property with a loan from NMSI, which was secured by a deed of trust recorded against the Property. (Ex. A, Docket No. 54-2.) On March 3, 2017, Mortgage Electronic, as nominee for NMSI, assigned NMSI's rights to Nationstar mortgage. (Ex. B, Docket No. 54-2.) Therefore, Nationstar did not have an interest in the Property until March 3, 2017, and Nationstar filed its motion to intervene on March 6,

2017. (Mot., Docket No. 56.) Accordingly, Nationstar did not delay the filing of the motion. Therefore, this factor favors timeliness.

iii. Prejudice to Existing Parties

To determine prejudice in the context of a timeliness analysis, the court must consider the prejudice resulting from delayed intervention, and not the prejudice that results from intervention by itself. Day v. Apoliona, 505 F.3d 963, 965 (9th Cir. 2007). Here, as previously discussed, Nationstar did not delay its intervention. In conclusion, this factor favors timeliness.

As discussed above, the three factors, taken together, support a finding of timeliness.

b. Significant Protectable Interest

"An applicant has a 'significant protectable interest' in an action if (1) it asserts an interest that is protected under some law, and (2) there is a 'relationship' between its legally protected interest and the plaintiff's claims." Cal. *ex rel.* Lockyer v. United States, 450 F.3d 436, 441 (9th Cir. 2006). To trigger the right to intervene, an economic interest must be concrete and related to the underlying subject matter of the litigation. Alisal, 370 F.3d at 919, 920 (holding that judgment debtor with an interest in the property of a defendant in the action did not have a right to intervene because its economic interest was not "related to the underlying subject matter of the litigation"). An impaired ability to collect on potential future judgments does not amount to a legally protectable interest. Id. at 920. Holding otherwise would "create an open invitation for virtually any creditor of a defendant to intervene in a lawsuit where damages might be awarded." Id.

Here, the Court finds that there is not a relationship between Canon's claims and Nationstar's interest in the Property. Nationstar argues that it has a significantly protectable interest because Canon seeks to dispose of the Property. (Mot., Docket No. 56 at 5.) However, the dispute between Le and Canon is regarding Le's alleged trademark infringement under the Lanham Act. (Compl., Docket No. 1.) While Nationstar might have an economic interest in this litigation, Nationstar's claims are not related to trademark infringement. Thus, there is not a relationship between Nationstar's legally protected interest and

Canon's claims.

Nationstar argues that the Ninth Circuit's ruling in Alisal is not applicable because Nationstar has an interest in the remedial phase of the litigation. (Reply, Docket No. 71 at 4.) Nevertheless, the Court in Alisal stated that "*regardless* of the phase of litigation at which an interest arises, that interest must be related to the underlying subject matter of the litigation." 370 F.3d at 920 (italics supplied) (internal citations omitted). Accordingly, even during the remedial phase, an intervenor's interest needs to be related to the underlying controversy.

In conclusion, the Court finds that Nationstar does not have a significant protectable interest. Because Nationstar does not meet this requirement, it does not have a right to intervene.[2]

2. Permissive Intervention

The Court finds that (1) there is an independent ground for jurisdiction and (2) Nationstar's motion is timely. However, there is not a common question of law and fact, so the Court will not grant Nationstar's motion under permissive intervention.

a. Independent Ground for Jurisdiction

Federal courts only have original jurisdiction over civil actions in which a federal question exists or in which complete diversity of citizenship between the parties exists and the amount in controversy exceeds $75,000. See 28 U.S.C. §§ 1331, 1332. For diversity purposes, "a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business. . . ." 28 U.S.C. § 1332(c)(1). Here, Canon is a citizen of New York and Nationstar is a citizen of Delaware and Texas. (Mot., Docket No. 56 at 8.) The Property's value also exceeds $300,000. (Id.) Therefore, there is an independent ground for jurisdiction.

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[2] Because Nationstar does not meet this requirement, the Court will not address the additional factors.

b. Timeliness

The same factors discussed under intervention of right apply to Rule 24(b) motions for permissive intervention. League of United Latin Am. Citizens, 131 F.3d at 1308. Accordingly, Nationstar's motion to intervene is timely.

c. Common Question of Law and Fact

The Court finds that there is not a common question of law and fact. Canon's claims are regarding trademark infringement. (Compl., Docket No. 1.) However, Nationstar's claims and factual allegations are regarding the Property. (Mot., Docket No. 6 at 9.) Thus, this factor weighs against permissive intervention.[3]

B. Nationstar's Motion to Set Aside Default

Because the Court denies Nationstar's motion to intervene, Nationstar is not a party in this action. Accordingly, the Court **denies** Nationstar's motion to set aside default. Citibank Intern. v. Collier–Traino, Inc., 809 F.2d 1438, 1441 (9th Cir. 1987) (holding that, except in exceptional circumstances, a non-party does not have standing to move to vacate a judgment or order).

C. Le's Motion to Set Aside Default

The Court finds that (1) Canon properly served Le and (2) Le has not demonstrated that the default judgment was not the result of his culpable conduct. Therefore, the Court **denies** Le's motion.

1. Service

"[A]n individual . . . may be served in a judicial district of the United States by . . . following state law for serving a summons in an action brought in courts of

[3] "A mere interest in property that may be impacted by litigation is not a passport to participate in the litigation itself. To hold otherwise would create a slippery slope where anyone with an interest in the property of a party to a lawsuit could bootstrap that stake into an interest in the litigation itself." Alisal, 370 F.3d at 920 n.3.

general jurisdiction in the state where the district court is made or where service is made." Fed. R. Civ. P. 4(e)(1). Section 415.20(b) of the California Code of Civil Procedure authorizes substitute service at the defendant's dwelling house, usual place of abode, usual place of business, or usual mailing address, in the presence of a competent member of the household or a person apparently in charge of his or her usual mailing address, who is at least 18 years of age. The statute also requires mailing a copy of the summons and of the complaint by first-class mail to the defendant at the place where service was made. Id. The California statute authorizing substitute service expressly provides that such service is only permitted after reasonably diligent efforts at personal service have been made. Id.

Canon engaged in reasonably diligent efforts to personally serve Le. On June 20, 2015; June 24, 2015; June 27, 2015; July 1, 2015; and July 5, 2015, a process server attempted to personally serve Le at his home address. (Ex. C, Docket No. 59-1 at 13.) On July 5, 2015, the process server wrote the following: "[u]nable to effect service at given address. Spoke to a vistor [*sic*] at the addres [*sic*] who stated Tony Le is over seas & they didn't know who the other defendant is." (Id.)

Canon served the summons and complaint at Le's usual place of business. Le argues that he prefers to conduct business at his home instead of at his office in Westminister; however, the objective evidence contradicts Le's statement. On February 20, 2015, Le filed a statement of information for Brand One, Inc. with California's Secretary of State. (Ex. D, Docket No. 59-1.) That statement says that Le is the C.E.O., and the street address for service of process is 8251 Westminister Blvd., #205, Westminister, California. (Id.) A picture taken on March 25, 2015, shows a door with the number "205" and the name "Le's Enterprises of California." (Ex. A, Docket No. 59-1.) In his declaration, Le states that "[he] own[s] interests in businesses in the United States. Those businesses share an office located at 8251 Westminister Blvd., #205, Westminister, California 92683." (Le Decl., Docket No. 50-6 ¶ 23.) Accordingly, the Court finds that the Westminister address is Le's usual place of business.

Canon correctly served a person apparently in charge of Le's usual place of business. On March 25, 2015, Canon served Trang Vuong ("Vuong") with a cease and desist letter at 8251 Westminister Blvd., #205, Westminister, California. (Ex. A, Docket No. 59-1.) Vuong provided a business card that says she is the C.E.O.

of Le's Enterprises. (Id.) On July 8, 2015, the process server served Vuong with the summons and complaint. (Ex. C, Docket No. 59-1 at 10, 14.) Le also stated in his declaration that Vuong is an assistant in his Westminister office. (Le Decl., Docket No. 50-6 ¶ 23.) The process server then mailed the summons and complaint to Le at the Westminister office. (Ex. C, Docket No. 59-1.)

In conclusion, Canon properly served Le through substitute service.

2. Mistake or Excusable Neglect

"Where a defendant seeks relief under Rule 60(b)(1) based upon 'excusable neglect,' the court applies the same three factors governing the inquiry into 'good cause.'" Brandt v. Am. Bankers Ins. Co. of Fla., 653 F.3d 1108, 1111 (9th Cir. 2011). Good cause is established when the defendant demonstrates that (1) the default was not the result of defendant's culpable conduct, (2) a meritorious defense exists, and (3) reopening the default judgment would not result in prejudice to the plaintiff. TCI Grp. Life Ins. Plan v. Knoebber, 244 F.3d 691, 697 (9th Cir. 2001).

Culpable conduct occurs when a defendant "has received actual or constructive notice of the filing of the action and intentionally failed to answer." Alan Neuman Prods., Inc. v. Albright, 862 F.2d 1388, 1392 (9th Cir. 1988). "Neglectful failure to answer as to which the defendant offers a credible, good faith explanation negating any intention to take advantage of the opposing party, interfere with judicial decision making, or otherwise manipulate the legal process is not 'intentional' . . . and is therefore not necessarily . . . culpable or inexcusable." TCI, 244 F.3d at 697–98.

Le argues that his default was not the result of culpable conduct. (Mot., Docket No. 50 at 9.) According to Le, "Thuy Le" and "Tony Le" are very common Vietnamese names, so he assumed that the documents were misdelivered. (Le Decl., Docket No. 50-6 ¶ 30.) When Le received the complaint, he asked Nguyen to contact Canon's attorneys and resolve the dispute. (Id. ¶ 32.) Nguyen told Le that he met with Canon's attorneys in August 2015 and that Nguyen resolved the matter. (Id. ¶ 33.) Le then received the judgment in February 2016. (Id. ¶ 34.)

However, in light of the record, the Court finds that Le has failed to meet his burden of demonstrating good cause or excusable neglect. On November 3, 2015, Canon's attorneys served Le through mail the request for entry of default. (Docket No. 15 at 18.) On January 8, 2016, Canon's attorneys served Le through mail the notice and motion for entry of default judgment. (Docket No. 19 at 40.) Le also admits that he discovered the default judgment in February 2016. (Le Decl., Docket No. 50-6 ¶ 34.) Furthermore, Canon recorded the abstract of judgment on March 17, 2016. (Ex. B, Docket No. 30-2.) On March 28, 2016, Le transferred the Property to his wife. (Ex. D, Docket No. 30-2.) On June 15, 2016, Le's wife conveyed the Property to the Current Owners. (Ex. F, Docket No. 30-2.) Because (1) Le failed to respond to notices that he received after Nguyen told Le that Nguyen resolved the matter in August 2015 and (2) Le sold the Property after Canon recorded the judgment, the Court does not believe that Le's failure to respond was unintentional.

In conclusion, Le has not demonstrated good cause.

C. Order to Show Cause Why Order for Sale of Real Property Should Not Be Made

Because Canon did not properly serve H. Ngo and P. Ngo under section 700.015(b) of the California Civil Procedure Code, the Court cannot order the sale of the Property.

Le argues that the Court should not authorize the sale of the Property because Canon failed to give proper notice of the levy and order to show cause to at least two of the current owners.[4] (Opp'n, Docket No. 58 at 3.)

California law provides requirements for service of the writ and a notice of levy on current owners of a property:

> *At the time of levy or promptly thereafter,* the levying officer shall serve a copy of the writ and a notice of levy on any third person in whose name the judgment debtor's interest in the real property

[4] Nationstar also filed an opposition to the order to show cause. However, because Nationstar is not a party in this action, the Court will not examine Nationstar's opposition.

> stands upon the records of the county. Service shall be made personally or by mail. If service on the third person is by mail, it shall be sent to the person at the address for such person, if any, shown by the records of the office of the tax assessor of the county where the real property is located or, *if no address is so shown, to the person at the address used by the county recorder for the return of the instrument creating the interest of the third person in the property.*

Cal. Civ. Proc. Code § 700.015(b).

Canon properly served T. Le and H. Le under the statute, but it did not properly serve H. Ngo and P. Ngo. The Orange County Tax Assessor's Office has no publicly-available address on record for any of the Current Owners. (Miranda Decl., Docket No. 67-5 ¶ 4.) The grant deed creating the Current Owners' interest in the property provides an address to be used for the return of instrument (the "Poinsettia Address"), which is the address of T. Le and H. Le. (Ex. F., Docket No. 30-2 at 14.) A public record search shows that H. Ngo's Family Trust owns the Poinsettia Address. (Ex. A, Docket No. 67-1.) On January 11, 2017, Canon mailed the notice of levy and writ of execution to T. Le and H. Le at the Poinsettia Address. (POS, Docket Nos. 40, 44.) However, Canon mailed the writ and notice of levy to H. Ngo and P. Ngo at the Property, not the Poinsettia Address. (POS, Docket Nos. 46, 48.) Canon also mailed the *ex parte* application to H. Ngo and P. Ngo at the Property address. (POS, Docket No. 49.) Accordingly, Cannon did not properly serve two of the Current Owners.

In conclusion, because Canon did not properly serve two of the Current Owners, the Court cannot order sale of the Property. This denial is without prejudice to a renewed application based on proper service to all required parties.

IV. CONCLUSION

The Court (1) **denies** Nationstar's motion to intervene, (2) **denies** Nationstar's motion to set aside default, (3) **denies** Le's motion to set aside default, and (4) **does not** order sale of the property.

IT IS SO ORDERED.